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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 75

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1019

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, Tax Commissioner of Ohio,
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT AS TO JURISDICTION

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States, the Appellant, International Harvester Company, files this Statement, showing that this Court has jurisdiction upon appeal to review the judgment in question.

This is an appeal from the judgment of the Supreme Court of Ohio in the cause of International Harvester Company, Appellant, vs. William S. Evatt, Tax Commissioner of Ohio, Appellee, reported in 64 N. E. (2nd) 53, 146 Ohio State 58, wherein the Supreme Court of Ohio affirmed the decision of the Ohio Board of Tax Appeals in the cause

wherein International Harvester Company had appealed from additional Ohio Franchise Tax assessments of the Tax Commissioner of Ohio for the years 1935 to 1940 inclusive. A copy of the Opinion of the Supreme Court of Ohio is appended hereto, as Appendix A.

Basis of Jurisdiction

Section 237 of the Judicial Code (28 U. S. C. 344) gives jurisdiction for this appeal. It provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court by writ of error. By act of January 31, 1928, Chapter 14, Section 1 (28 U. S. C. 861a), the remedy by appeal has been substituted for writ of error in such cases.

The State Statute Involved

The statute of the State of Ohio, the validity of which as applied to the Appellant herein is involved, is the Ohio Franchise Tax on Foreign Corporations, found in Sections 5495 to 5499 of the General Code of Ohio.

Section 5495 provides for an annual fee or franchise tax levied on each domestic corporation "for the privilege of exercising its franchise during the calendar year," and on each foreign corporation "for the privilege of doing business in this State." The tax is based on a portion of the value of the total issued and outstanding capital stock of the corporation (Sec. 5498).

Section 5498 provides that after finding the total value of the issued and outstanding shares of stock of a foreign corporation, the commission shall proceed as follows:

"Divide into two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio, and whose denominator is the fair value of all its property wheresoever situated, in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted."

The resulting amount is subjected to a fee of 1/10th of 1%. Section 5499, General Code of Ohio.

Section 5611 of the General Code of Ohio provides that the remedy of the taxpayer is by appeal to the Ohio Board of Tax Appeals, which was the procedure followed in this case. From the decision of the Ohio Board of Tax Appeals, Appellant appealed to the Supreme Court of Ohio.

Date of Judgment to Be Reviewed and Date of Presentation of Application for Review

The date of the final decision and judgment of the Supreme Court of Ohio sought to be reviewed was November 21, 1945.

The Petition for Appeal was presented to and allowed by Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, on February 19th, 1946.

Finality of Judgment

The Supreme Court of Ohio is the highest court in the State of Ohio. Ohio Constitution, Article IV, Sections 1 and 2. Its judgment became final on November 21, 1945.

The Nature of the Case

This appeal involves the Ohio Franchise Taxes assessed against International Harvester Company for the years 1937 to 1940, inclusive, based in the case of each year on the property held and business done by International Harvester Company in the preceding year.

The Ohio Franchise Tax is not a tax in lieu of a property tax, but an additional tax. The Ohio statutes provide for the taxation of real estate and personal property and Appellant's property in the State was, of course, subject to such general property taxation (Section 5328, General Code of Ohio).

There is no dispute as to the total value of the Appellant's outstanding and issued capital stock, nor is there any dispute as to the amount or value of Appellant's property in Ohio, or to total property on the basis of which a part of the Franchise Tax is assessed.

The sole question in dispute is the method employed for determining that part of the Franchise Tax based on an allocation and division of the Company's total annual business into (1) business done within Ohio, and (2) business done outside Ohio.

In making this allocation, the Board of Tax Appeals used inconsistent formulas as follows:

1. The Board allocated (and we believe properly) to Ohio business all sales solicited and secured by Appellant's Ohio branches from Ohio customers for products made at Harvester factories outside of Ohio, which products were shipped direct by the factory to the Ohio customers, this shipment, however, being made by direction of the Ohio branch which had previously obtained the customer's order and which kept all records of the sale and collected the purchase price.

2. Inconsistently, the Board of Tax Appeals also included in business done in Ohio similar transactions where the situation was exactly reversed, that is, nothing happened in Ohio except the manufacture of motor trucks at Appellant's plant at Springfield, Ohio, known as the Springfield Works of International Harvester Company, and the shipment of such trucks from the Springfield plant direct to customers outside of Ohio in response to a direction to make such shipment, sent to the Springfield plant by the Company's branches outside Ohio which had previously obtained and accepted the customer's order, kept all the accounts and received the sales proceeds.

This inconsistency in the formulas used was not a small error, having little effect on the Franchise Tax. Thirty-eight per cent (38%) in dollar volume of all motor trucks shipped from the Springfield plant [1] to points in the United States outside of Ohio during the four years on which the additional Franchise Tax assessments for 1937, 1938, 1939 and 1940 are based, were shipped direct to customers at the request of the respective Company's branches throughout the United States which had obtained each order and handled the transaction throughout, as stated above in paragraph 2.

The Board of Tax Appeals of Ohio modified the additional assessments of the Tax Commissioner, but sustained so much of the additional assessments as resulted from including in Ohio business sales of motor trucks produced at the Springfield plant, sold by branches outside of Ohio when the trucks were shipped direct from the Springfield plant to the buyer in States other than Ohio. This was done pursuant to Rule No. 275 of the Tax Commissioner, adopted October 13, 1939.

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[1] Hereinafter in this Jurisdictional Statement, all references to the Springfield plant refer to the Appellant's plant located at Springfield, Ohio.

Appellant then appealed from the decision of the Board of Tax Appeals to the Supreme Court of Ohio, which affirmed the decision of the Board of Tax Appeals.

This appeal is limited to the Franchise Tax Returns for the years 1937 to 1940 inclusive. The amounts of additional Ohio Franchise Taxes under the assessments of the Tax Commissioner for the above years 1937 to 1940 inclusive, reduced in accordance with the decision of the Supreme Court of Ohio, are given in the following table:

Year	Increased Capital Stock Valuations	Increased Franchise Taxes
1937	$12,509,000	$12,509.00
1938	11,350,000	11,350.00
1939	12,158,000	12,158.00
1940	14,098,000	14,098.00
Total		$50,115.00

Rule No. 275, adopted October 13, 1939 by the Tax Commissioner of Ohio, reads as follows:

> "Rule No. 275. Business done in and out of Ohio. Business done in and out of Ohio by a corporation subject to the payment of franchise taxes shall be determined under Section 5498, General Code, by allocating to the business fraction therein provided sales in and out of Ohio.
>
> All sales of goods from warehouses in Ohio, wherever manufactured, shall be considered as Ohio sales.
>
> In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state.
>
> The denominator of such business fraction shall in all cases be the total sales wherever made" (R. 118).[2]

[2] Page references to Record refer to block printed page numbers at top of page, not to red stamped numbers at the bottom.

International Harvester Company is a corporation of the state of New Jersey, with general business and accounting offices located in the city of Chicago, Illinois. It is engaged in the business of the manufacture of agricultural implements, tractors, motor trucks, binder twine and similar commodities and parts thereof, and the sale of such products (R. 108).

During the years 1936 to 1939, inclusive, it operated four factories in Chicago, namely the McCormick Works, McCormick Twine Mill, Tractor Works and West Pullman Works, as well as factories in Auburn, N. Y., Milwaukee, Wis., Chattanooga, Tenn., Canton, Rock Falls, Rock Island and East Moline, Illinois, New Orleans, La., two factories in Springfield, Ohio, factories at Fort Wayne and Richmond, Indiana, and also for part of such period a factory at Indianapolis, Indiana, and a factory at Huntington Park, California (R. 108).

International Harvester Company operated in the years 1936 to 1939, inclusive, more than 100 selling branches in the United States, selling agricultural implements and machines, tractors, motor trucks and kindred lines and repairs therefor, and binder twine to dealers and users; also a number of retail stores known as McCormick-Deering Stores, selling at retail to the public; and also a number of retail motor truck substations selling motor trucks at retail to the public, and occasionally selling, at wholesale, motor trucks to dealers. These McCormick-Deering Stores and motor truck substations were under the supervision of the branch house in whose territory they were located (R. 110).

The Ohio branches of International Harvester Company in 1936 to 1939, inclusive, were located at Columbus, Cincinnati, Toledo and Cleveland. The McCormick-Deering Stores in Ohio of Appellant in the same period were lo-

cated at Greenville, Van Wert, Ashland, Bellevue, Canton, Findlay, Marion, Troy, Wooster, Hamilton and Portsmouth. The motor truck substations in the State of Ohio in the same period were located at Akron, Springfield and Youngstown (R. 110).

The goods were shipped f.o.b. factory to the branches for sale by the branches, or direct to the dealers, or in a very small percentage of sales direct to the user purchasing from the branch.

Except for a small amount of sales of miscellaneous castings and repair parts direct to customers made by the factories, all sales in the United States of agricultural implements and machines, motor trucks, tractors and kindred lines to dealers and consumers were made on orders solicited by representatives of the selling branch in whose territory the buyers were located, or on orders received by mail by the selling branch. All orders and contracts for the sale of goods were accepted by the branch manager of the branch in whose territory the buyers were located (R. 112).

The sales proceeds, cash and notes for all machines and implements sold by a branch are received by the selling branch and interest and principal on the notes are collected by the branch making the sale (R. 112).

Except for miscellaneous castings and repair parts above referred to, which are sold direct by the factories, the function of the factories is limited to the manufacture of the goods, and the shipment thereof when manufactured to the selling branches or to subsidiaries, or direct to the purchasers on orders received from the branches in the case of sales in the United States, or from the general office in Chicago in the case of sales to subsidiaries or to jobbers in foreign countries (R. 113).

When goods are sold by a branch, the branch either delivers the articles from its own warehouse stock, or directs that the goods be shipped by the factory direct either to the dealer or, in a very small percentage of cases, direct to the consumer (R. 113).

Delivery of motor trucks from the Springfield plant was made partly by rail shipments from the factory to the branch, or direct to the dealers, but chiefly by driveaway by independent driveaway companies from the factory to the branch or to the dealer, or by the dealer taking delivery himself at the factory. In a very small proportion of cases, probably less than 1%, shipment was made from the factory direct to the consumer or delivery was made at the factory to the consumer who drove his own truck away (R. 114-115).

The Federal Questions Involved Are Substantial

The Federal questions involved on this appeal arise from the inclusion in business done in Ohio in computing the Ohio Franchise Taxes of Appellant for the years 1937 to 1940 inclusive of sales of trucks produced at Appellant's Springfield, Ohio, motor truck plant, when the sales were made on orders solicited and accepted by Appellant's branches outside of Ohio and the trucks were shipped on orders of the branches outside Ohio from the factories direct to the buyers, dealers or consumers on the orders of the outside branches. This is the very same class of sales which this Court held in *International Harvester Company, et al.* v. *Department of Treasury, et al.*, 322 U. S. 340, were sales subject to the Indiana Gross Income Tax if the branch and the buyer were both located in the State of Indiana and the factory was located outside the State of Indiana.

The same sales were used in determining the amount of franchise taxes in 9 states and income taxes in 32 states and the District of Columbia.

In the computation of the tax, sales of Springfield trucks are included in Ohio business when the sales were made by branches of Appellant outside Ohio and the trucks were shipped direct from the Springfield factory to the buyers in other states, although Appellant included in its Ohio franchise tax returns and the Commissioner has based his assessments on the inclusion of sales of goods manufactured outside of Ohio, which were sold by Ohio branches and shipped direct from factories or warehouses of Appellant outside Ohio to Ohio buyers.

The two Federal Questions involved on this appeal are:

1. Does the inclusion as Ohio business of the sales described above deny Appellant due process of law under the 14th Amendment to the Constitution of the United States, as taxing property and business outside of Ohio, the taxing jurisdiction?

2. Does the inclusion of such sales in Ohio business lay a burden on interstate commerce?

There Is a Substantial Federal Question Whether the Inclusion of the Above Sales as Ohio Business Denies Due Process of Law under the Fourteenth Amendment.

In its decision in this cause, the Supreme Court of Ohio has upheld the inclusion in the numerator of the business fraction of the Ohio Franchise Tax of sales of motor trucks produced at the Springfield plant of the Appellant where the orders or contracts were solicited and accepted by branches of the Appellant outside of Ohio, and the trucks were shipped by the factory at Springfield on orders of

the selling branches in other states direct from the factory to the buyer, either dealer or consumer. This is on the theory that under Rule No. 275 the sales were made from Ohio warehouses. The branches outside of Ohio received the sales proceeds, and collected the notes given in payment when they became due. The Springfield plant has no salesmen and has nothing to do with handling sales orders. When the Springfield plant ships a truck, it makes out a property invoice which it sends to the branch making the sale on which no dollars or cents are shown. It was testified that the plant "is not interested in" and has "nothing to do with dollars and cents" (R. 99). The customer is billed by the branch house (R. 101).

We submit that it is anomalous to say that these sales are made from an Ohio warehouse. And this contention necessarily involves a substantial Federal question, namely the question whether such sales have a situs in Ohio, and whether it does not deny due process of law for Ohio to include as Ohio business sales which are made from branches outside the State.

The Record shows that the factory at Springfield is merely a factory and a shipping point. The Springfield plant has no warehouse whatever. As soon as a truck is completed it is shipped out and must be shipped out, for there is no roo mfor it at the plant (R. 96). Every essential step in the sale except the shipment of the truck is done outside of Ohio, and the shipment itself is made on the direction of the branch outside Ohio. The business is handled in exactly the same way in the case where the sale is made from the branch house floor and in the case where the branch directs the truck to be shipped direct to the buyer. In each case the outside branch accepts the order and receives the proceeds. In one case it delivers the truck from the branch house floor. In the other case,

it directs the Springfield plant to ship the truck to the buyer. It is a fair inference that the shipment of the truck direct to the buyer is done either to save time or transportation charges.

It is obvious that these sales are of the very same class which this Court held in *International Harvester Company, et al.* v. *Department of Treasury, et al.*, 322 U. S. 340, would be subject to the Indiana Gross Income Tax if the contract were accepted by an Indiana branch of International Harvester Company, and the buyer lived in Indiana. In that case the goods were manufactured outside Indiana and shipped direct to the buyer in Indiana on the direction of the branch in Indiana which accepted the sale contract. We submit that it is impossible for the same sale to be an Indiana sale under the Class E category in the above case, and also an Ohio sale for the purposes of the Ohio Franchise Tax. Yet that is exactly what the Ohio Tax Commissioner's inclusion of these sales as Ohio sales comes to. It would seem to follow that the franchise tax value created by such sales has a situs outside of Ohio.

There is, therefore, serious question whether Ohio has jurisdiction over these sales, entitling it to use them as the measure of business done in Ohio for the purpose of computing the Ohio Franchise Tax. If the sales are not Ohio sales but sales of the states where the branches and buyers are located, as decided in the case of *International Harvester Company, et al.* v. *Department of Treasury, et al., supra*, it would follow that it is a denial of due process of law under the Fourteenth Amendment for Ohio to include them as Ohio business done.

The taxing of extra-territorial values is accomplished in the instant case by the illogical interpretation of the statutory words "business done" as meaning in the case

of business done in Ohio both Ohio sales and Ohio manufacturing activity and as meaning in the case of total business done everywhere only sales everywhere. The same statutory words "business done" are given a double meaning as respects Ohio business, but only a single meaning as respects business everywhere. Consistency and logic, not to mention the due process clause, require that the concept of "business done" be given reciprocal and correlative encompassment in the numerator and denominator of the business done fraction. If both Ohio sales and Ohio made goods are to be included in the numerator, then both sales everywhere and goods made everywhere should be included in the denominator.

However, since the formula adopted by the Ohio Tax Commissioner and by the Courts below uses sales everywhere as the sole element in the denominator, it follows that the numerator must necessarily consist only of sales in Ohio. The use of a business done fraction with such a correlated numerator and denominator, would avoid measuring the tax by extra-territorial values and would be consistent with the requirements of due process under the decisions of this Court.

This question of constitutionality is brought into glaring focus by the utterly inconsistent position of the Ohio Tax authorities and the Courts below in using as the measure of the tax sales by branches outside of Ohio of trucks produced at the Springfield plant, when the trucks were shipped direct from the Springfield factories to buyers in other states, and yet at the same time including sales by Ohio branches of goods shipped from factories and warehouses outside Ohio direct to the buyers in Ohio.

The undisputed evidence showed that in determining Ohio business no deduction had been made of sales by

Ohio branches, where the goods were shipped from places of business of the Appellant outside Ohio direct to the buyers in Ohio (R. 53).

We submit that there is no possible basis for defending the inconsistency in including in Ohio business sales by branches outside of Ohio, where the trucks were shipped from the Ohio plant to out of state buyers, and at the same time including sales by Ohio branches where the goods were shipped to Ohio buyers from factories or warehouses of the Appellant outside of Ohio. To include both classes of sales in Ohio business must necessarily be to include one class of sales which does not constitute business done in Ohio, and therefore to tax property and business outside the jurisdiction of Ohio, and consequently to deny due process of law under the Fourteenth Amendment.

Appellant submits that the volume of sales by Ohio branches to Ohio buyers, where the goods were shipped from factories outside of Ohio direct to the buyers in Ohio, was considerable as it was in the case of the sales of Springfield trucks by branches outside of Ohio, shipped from the Springfield plant direct to buyers in other States on sales by branches in those States.

But after all the amount of sales is immaterial, for of course we agree that sales by Ohio branches to Ohio buyers of goods manufactured outside of Ohio, which were shipped direct from factories or warehouses outside of Ohio to the buyers in Ohio, may properly be considered Ohio business. Appellant included such sales as Ohio business on its returns. But if such sales are Ohio business, then inescapably sales by Ohio branches of Springfield motor trucks shipped direct from the Springfield factory to buyers in other States are not Ohio business. *International Harvester Company, et al.* v. *Department of Treasury, et al., supra.*

The result of including these sales in Ohio business is a distorted formula, which inevitably allocates to Ohio a disproportionate and arbitrary percentage of Appellant's capital stock value.

Although the amount of Ohio business done was materially reduced by the Ohio Board of Tax Appeals from the figure found by the Tax Commissioner by excluding sales by branches outside of Ohio off their own warehouse floors, nevertheless there still remains in Ohio business, taking the year 1939 as an example, the amount of $11,578,844, representing sales of Springfield trucks sold by branches outside of Ohio which were delivered by shipment direct from the factory to buyers in other States (R. 84, 85, Appellee's Ex. G). If this amount is excluded from Ohio business, the resulting Ohio Franchise Tax on the business done fraction would be $11,109.00.[3] If the amount of Ohio business on the basis of the decision of the Supreme Court of Ohio is used as the numerator, namely $24,411,518.00, the resulting tax on the business done fraction would be

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[3] Tax on Business Done Fraction by excluding from business done in Ohio sales by branches outside of Ohio of Springfield motor trucks sold by branches outside Ohio, where the trucks were shipped from the Springfield plant direct to dealers and users outside of Ohio.

$12,832,674 Ohio Business Done
$213,001,465 Total Business Done = 6.0246% multiplied by $184,392,489
(one-half capital stock value) = $11,108,910.
Franchise Tax at 1/10% = $11,109

$12,832,674 Ohio business is made up as follows:

$8,125,736 Ohio business per Appellant's original Franchise Tax Returns, consisting of sales of Ohio branches to Ohio buyers, plus Works collaterals sold direct to customers (R. 126).
4,706,938 Sales of Springfield trucks to subsidiaries. (Appellee's Ex. G-A-2)
$12,832,674

$213,001,465 Total Business (R. 127).
$184,392,489 is one-half total capital stock value of $368,784,979 (R. 127).

$21,132.00.[4] If the sales of Springfield trucks shipped direct to buyers in other States were deducted and also shipments of trucks to subsidiary companies, the resulting tax on the business done fraction would be $7,034.00.[5] The computations are shown in a footnote.

This Court held in its decisive opinion in the case of *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U. S. 123, that the North Carolina income tax on Hans Rees' Sons, Inc., a New York corporation, denied due process of law under the 14th Amendment because it allocated to North Carolina an excessive and arbitrary amount of the total net income of Hans Rees' Sons, Inc. The total net income was allocated to North Carolina solely on the ratio of tangible property in

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[4] Tax on Business Done Fraction under decision of Supreme Court of Ohio:

$$\frac{\text{\$24,411,518 Ohio Business}}{\text{\$213,0001,465 Total Business}} = 11.4607\% \text{ multiplied by \$184,392,489 (one-half capital stock value)} = \$21,132,670$$

Franchise Tax at 1/10% = $21,132

$24,411,518 Ohio business is made up as follows:

$8,125,736 Ohio business per Appellant's returns
4,706,938 Sales of Springfield trucks to subsidiaries
11,578,844 Sales by branches outside Ohio of Springfield trucks shipped direct from the Springfield plant to dealers and users outside Ohio

$24,411,518

The amount of $11,578,844 is arrived at by deducting $1,858,184 sales of Springfield trucks by Ohio branches (R. 84) from $32,328,826 total sales of Springfield trucks to dealers and users in the United States (Appellee's Exhibit G-A-2) and taking 38% of the balance of $30,470,642.

[5] Tax on Business Done Fraction, Ohio Business and Total Business as reported in Appellant's Returns:

$$\frac{\text{\$8,125,736 Ohio Business}}{\text{\$213,001,465 Total Business}} = 3.8148\% \text{ multiplied by \$184,392,489 (one-half capital stock value)} = \$7,034,205.$$

Franchise Tax at 1/10% = $7,034.

North Carolina to total tangible property. This Court held that the North Carolina formula as applied to Hans Rees' Sons, Inc. was unreasonable and arbitrary in that it attributed to North Carolina a percentage of income "out of all appropriate proportion to the business transacted by the Appellant in the State." This Court said that where a corporation manufactured its goods in North Carolina and sold them in New York, the entire net income from the manufacture and sale of the goods could not under the Federal Due Process Clause "be taxed in one State regardless of the extent to which it may be derived from the conduct of the enterprise in another State" (R. 133).

In the Ohio Franchise Tax assessments involved in this appeal one tax on one-half of the entire capital stock value is measured solely by the percentage of business done in Ohio. Almost half of the total Ohio business used in the assessment consists of sales made outside of Ohio which are subject to sales and gross receipts taxes and are used as the measure of income and franchise taxes in States outside of Ohio.

The use of an arbitrary allocation formula which results in attributing an excessive tax value to the taxing state, as in the *Hans Rees'* case and in this case, is invalid as an attempt by the State to tax extra-territorial values and a denial of due process of law, upon the same grounds that the attempt to tax the full value of the entire capital stock value of the foreign corporation was condemned in *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, and *Looney* v. *Crane & Co.*, 245 U. S. 178, and upon the same grounds that the attempt to fix an arbitrary value of $100.00 per share on no par capital stock actually worth only $7.00 per share (notwithstanding the application of a fair allocation formula to such arbitrary value) was condemned in *Air-Way Electric Corporation* v. *Day*, 266 U. S. 71. The validity of the Ohio

formula as applied in this case therefore raises a substantial Federal question.

Unlike the Texas franchise tax upheld in *Ford Motor Co. v. Beauchamp,* 308 U. S. 331, which was measured solely by receipts from local intrastate sales to Texas buyers, the Ohio tax uses extra-state sales as a measure of the tax on one-half of the capital stock value. No decision of this Court to date has given validity to that basis of tax, and the Court has expressed the view that extra-state values may not be so utilized as to attribute an excessive proportion of the corporate stock or net worth or income to the taxing State.

If the ratio of Ohio property to total business were the sole measure of the Ohio tax, approximately 1/40th of the capital stock value would be attributed to Ohio. If the ratio of Ohio business to total business, as reported on Appellant's Ohio Franchise Tax Returns, were the sole measure, approximately 1/26th of the capital stock value would be attributed to Ohio. But again, if the business ratio were the sole ratio and if the extra-state sales were added to the amount of Ohio business, approximately 1/9th of the entire capital stock value would be attributed to Ohio. On the basis approved by the decision of the Supreme Court of Ohio, utilizing the extra-state sales in the measure of Ohio business, and allocating one-half the capital stock value on the property fraction and one-half on the business done fraction, approximately 1/14th of the entire capital stock value is attributed to Ohio.[6] If, therefore, all of the 48 States and the District of Columbia levied a franchise tax on the basis of the Ohio tax, the total stock value taxed would be greatly in excess of the actual total value. Both in

[6] These percentages are based on business done and the capital stock value in the business year 1939, as a sample. (R. 126-127; and Example 2 in footnote of this Statement, page 15.)

theory and in practice, the Ohio tax therefore taxes extra-territorial values and is a denial of due process of law.

There Is a Substantial Federal Question Whether the Use of Such Extra-state and Interstate Sales as a Measure of the Ohio Franchise Tax Imposes a Burden on Interstate Commerce in Violation of the Commerce Clause of the Federal Constitution.

The assessments involved in this appeal result from including in Ohio business sales of motor trucks produced at Springfield, Ohio, sold by branches located outside Ohio all over the United States and shipped on orders of those branches direct from Springfield to the buyers in States other than Ohio. We submit that these sales are either sales in interstate commerce, or they are extra-state commerce.

If they are extra-state sales, we contend, as we have argued above, that Ohio has no jurisdiction to tax such sales or use them as a measure of a tax under the due process clause of the Fourteenth Amendment.

If they are interstate commerce sales, we submit that to use them as a measure is to lay a burden on interstate commerce in violation of the Commerce Clause.

As we have earlier stated, the Ohio Franchise Tax is really two taxes. There is one tax on one-half of the capital stock value based on the property fraction. It has nothing to do with the other tax, which is a tax on one-half of the capital stock value based on the business done fraction. As either fraction goes up or down, the tax under that fraction is separately and independently affected. Therefore, an increase in Ohio business done directly and necessarily results in an increase of Ohio Franchise Tax. Accordingly, we submit that to measure one of the two taxes by using in the numerator of the fraction gross receipts from sales made

in interstate commerce is to lay a burden on interstate commerce, forbidden by the Commerce Clause.

It is true that in *Hump Hair Pin Co.* v. *Emmerson*, 258 U. S. 290, which was followed by *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, the Illinois Franchise Tax was upheld when there was included in Illinois business sales by the taxpayers of goods manufactured in Illinois where the orders were accepted in Illinois and the goods were shipped from the Illinois factories direct to buyers in other States. This Court said that while the sales were in interstate commerce, they did not directly affect the taxes because the amount of property in Illinois might go down while the sales in Illinois were increasing, and vice versa. In the Illinois tax, there is a unitary formula allocating a percentage of corporate value to Illinois by dividing the sum of Illinois business and property by the sum of total business and property.

In the first place, there were far more important Illinois elements in the handling of the Hump Hair Pin and Western Cartridge Illinois business than there were Ohio elements in the handling of the trucks shipped from the Springfield plant of International Harvester Company in this case. In the *Hump Hair Pin* and *Western Cartridge* cases the goods were made in Illinois, the contracts were accepted in Illinois, the offices handling the business were located in Illinois, and the proceeds were received in Illinois. In the case of our Ohio Franchise Tax, the orders were accepted by branches all over the country which handled the transactions from beginning to end. The factory at Springfield is not a sales office at all, knows nothing about sale contracts, nothing about prices, and does not receive the sales proceeds (R. 96, 112).

Moreover, and far more important, in the case of the Ohio Franchise Tax, since there really are two taxes, if

the amount of Ohio business increases, the tax increases. The United States Supreme Court said in the *Hump Hair Pin* and *Western Cartridge* cases that the effect of including interstate sales in the Illinois business was remote and indefinite and might not increase the tax at all. On the other hand, the effect of including the sales in question in Ohio business done is definite and immediate and almost doubles the tax. The property fraction does not affect the tax under the business done fraction, and the tax under the business done fraction does not affect the tax under the property fraction. Accordingly, we submit that under the very distinction made in the *Hump Hair Pin* and *Western Cartridge* cases, the inclusion of the sales in question as Ohio business done lays a burden on interstate commerce.

But the vital and compelling reason that the inclusion of the sales in question as Ohio business results in laying an invalid burden on interstate commerce is that the very same sales are used as the measure of business done or gross receipts or sales in many states where the Appellant has its branch houses.

We note that the Supreme Court of Ohio states "The record in this case discloses no instance of double taxation." We think this is surprising, in view of the fact that the record shows that the Appellant does business in 9 states which have franchise taxes, and 32 states and the District of Columbia which have income taxes, and that in every one of those states the Appellant makes its franchise and income tax returns, and returns as sales or gross receipts in the taxing state the sales made by the branches in that state, without excluding sales of goods manufactured outside of the state of the selling branch. (R. 55, 56, 90). It is also surprising in view of the decision of this Court in *International Harvester Company* v. *Department of Treasury*, which upheld the imposition of

sales and gross receipts taxes by states in which both the sales branch and the buyer are located.

We have seen that $11,578,844.00 of sales in 1939, for example, consisted of sales of motor trucks produced at the Springfield, Ohio, plant on contracts solicited, obtained and accepted by Appellant through its branches in other states with delivery of the trucks being made by shipment from the Springfield plant direct to the buyers in other states. Accordingly, so much of the above sales of $11,578,844.00 as were sales made by branch houses in the 9 franchise tax states and in the 32 income tax states and the District of Columbia where the Appellant does business, are used as a measure not only under the contested Ohio Franchise Tax assessments, but were also used as the measure of franchise and income taxes in other taxing jurisdictions. A direct gross receipts tax on the Indiana portion of such sales was upheld in *International Harvester Company* v. *Department of Treasury, supra,* thereby permitting all such sales to be subjected to direct sales and gross receipts taxes in states other than Ohio.

The egregious error of the Ohio Supreme Court in this case lies in its failure to recognize the development of the law made by this Court in *International Harvester Company* v. *Department of Treasury,* a decision that overruled the Court's long-standing pronouncement made in *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506. The Ohio Court decided the instant case upon the authority of its prior decision handed down in 1942 in *Aluminum Company of America* v. *Evatt, Tax Commissioner,* 140 Ohio State 385; 45 N. E. (2nd) 121, in which it said:

> "If Ohio-manufactured goods are shipped to a warehouse in another State where the sale would constitute doing business within such State, the Commissioner's rule eliminates the value of such goods from consideration. There is therefore no opportunity for

double taxation, as *goods which do not come to rest before sale do not lose their character of interstate commerce in the state of delivery.*" (Italics supplied.)

But this Court in 1944 in *International Harvester Company ,et al.* v. *Department of Treasury, et al., supra* repudiated the theory that the sale of goods, coming into a state in fulfillment of contract of sale made between a local seller and a local buyer, could not be taxed in the state of destination. That case held definitely that Indiana *could* tax sales of goods manufactured outside Indiana in a case where the branch and buyer were located in Indiana and the goods were shipped direct from a factory or warehouse outside of Indiana to the buyer in Indiana.

We submit, therefore, that contrary to the view expressed by the Court below, we have shown very positively that there is glaring double taxation resulting from the inclusion of the sales in question as business done in Ohio. This double taxation would arise not only under the Indiana Gross Income Tax and similar taxes on gross receipts in other states, but also under the franchise taxes of nine states and income taxes of 32 states and the District of Columbia.

This Court said in *International Harvester Company, et al.* v. *Department of Treasury, et al., uspra,* that it would "cross that bridge when we come to it," namely the bridge of double taxation. We respectfully submit that we have come to the bridge of double taxation.

There is therefore a very substantial Federal question involved as to whether the inclusion of sales made by branches all over the country of goods manufactured in Ohio and shipped from the Ohio factory to the buyers is not to lay a multiple and invalid burden on interstate commerce.

But the Supreme Court of Ohio finds jurisdiction to include the sales in question as Ohio business under the authority of the case of *American Mfg. Company* v. *St. Louis*, 250 U. S. 459. In other words, inclusion of the sales in question as Ohio business is justified on the ground that it is the manufacturing activity of the Appellant in Ohio which is being taxed. The Supreme Court of Ohio declares that "the method followed by the Tax Commissioner and approved by the Board of Tax Appeals, in ascertaining the amount of business done in Ohio, which is all that is in question in the instant case, follows the procedure approved by the Supreme Court of the United States in the case of *American Mfg. Company* v. *City of St. Louis*, 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522 • • •."

But we submit that the tax in the case of *American Mfg. Co.* v. *City of St .Louis, supra*, was an entirely different tax from the Ohio Franchise Tax. The City of St. Louis tax was a tax on the privilege of manufacturing, measured by the gross receipts wherever received by a corporation manufacturing in the City of St. Louis. It was not a franchise tax on the privilege of doing business in the city as a corporation, but the tax was definitely and specifically laid on the manufacturing activity.

In the case of *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, this Court expressly distinguished the St. Louis tax from the Indiana Gross Income Tax, stating that the St. Louis ordinance was definitely and specifically laid on the manufacturing activity, whereas the Indiana Gross Income Tax was "not a tax on the manufacture but a tax on gross sale" (R. 313).

The Ohio Franchise Tax is even more vitally different from the St. Louis tax than is the Indiana Gross Income Tax. The Ohio tax is not a tax on the manufacturing activity at all. It is a tax on the privilege of doing business

as a foreign corporation in Ohio, and the business may be one or many things—manufacturing, mining, wholesaling or retailing.

The Supreme Court of Ohio states in its opinion that it is "committed to the proposition that the operation of a factory in Ohio constitutes business done in Ohio regardless of where the products of such factory are sold," and that it is also committed to the "proposition that the volume of sales might be used as indicative of the volume of the manufacturing carried on in such factories and as a proper element of comparison with the volume, similarly computed, of total business done by the corporation in and out of the state."

Of course Appellant does not contend that manufacturing is not doing business. It does not contend that Ohio cannot tax the manufacturing activity of the Appellant in Ohio. It does contend that the Ohio Franchise Tax is not a tax on the manufacturing activity, but that it is a franchise tax on the doing of business by the corporation. Embodying two distinct tax bases, one tax is based on such proportion of one-half of the capital stock value as is found by the property fraction, and another tax on a proportion of one-half the capital stock value, based on the business done fraction.

It is obvious that under the property fraction Ohio is already taxing the manufacturing activity in measuring a separate tax by the property used in such manufacturing. The investment in the manufacturing plant, real estate, buildings, inventories, machinery and equipment is ordinarily a fair barometer of manufacturing activity.

If Ohio wishes to go further to reach the manufacturing activity with a specific excise tax, the way is open of course for its legislature to take steps to reach it. But we contend that since the Ohio Franchise Tax is not imposed on

the manufacturing activity, it is not permissible to distort its nature by making it partly a tax on the selling activity and partly on the manufacturing activity.

To our minds, the most conclusive reason why the taxes involved on this appeal are not taxes on the manufacturing activity is that the assessments as approved by the Ohio Board of Tax Appeals and the Supreme Court of Ohio have excluded all sales of Ohio produced trucks of the Appellant where the trucks were sold by branches of International Harvester Company outside Ohio from their own warehouse floors. The assessments as approved by the Ohio Board of Tax Appeals and the Supreme Court of Ohio include Ohio manufactured goods in the measure of the Ohio business when the trucks are shipped from the Ohio factory direct to the buyers, but do not include them when the trucks are sold by the branch and delivered from the branch house warehouses. The Ohio manufacturing activity is as great in one case as in the other. It is obvious that it is not the manufacturing activity which is being reached.

Moreover, as we have already shown, there is included in Ohio business done all sales by the Ohio branches of International Harvester Company of goods manufactured outside of Ohio and sold by the Ohio branches, whether delivered off the Ohio branch house floors or shipped from factories outside of Ohio direct to the buyers in Ohio on sales approved by the Ohio branches.

In addition, the evidence showed that the Springfield, Ohio, plant was largely an assembly plant. Only 15.94% of the total cost of production in 1936 was Springfield labor. In 1937 the percentage was 17.10%, in 1938, 15.32% and in 1939, 11.61%. The manufacturing activity, therefore, was from 82% to 88% outside of Ohio (Exhibit 6, R. 106).

It cannot be said, therefore, that Ohio is reaching the Ohio manufacturing activity. It does not reach it in the case of Ohio manufactured goods delivered off branch house floors outside of Ohio, and it reaches the Appellant's manufacturing activity in other states when the goods made at out-of-state factories are sold by Ohio branches.

The Manner in Which the Federal Questions Were Raised

The Federal questions here presented were raised in Appellant's appeal from the assessments made by the Ohio Tax Commissioner to the Ohio Board of Tax Appeals and again in the appeal from the Board's decision to the Ohio Supreme Court.

In the "Entry" of the Board of Tax Appeals, deciding the case, the Board said:

> "It is contended that the tax assessments in question violate the due process and commerce clauses of the United States Constitution. The full and careful consideration by the Supreme Court of Ohio of the questions raised in *Aluminum Company of America* v. *Evatt,* supra, so completely answers the claims of the appellant in this case that it is unnecessary to discuss the cases cited by appellant, some of which were considered in the opinion in that case" (R. 140).

In its opinion the Court below sets out the assignments of error of the Appellant, numbers (2) and (3) of which are as follows:

> "(2) In including in business done in Ohio sales of motor trucks produced at appellant's Springfield factories where the orders or contracts were solicited and accepted by branches of the appellant outside the state of Ohio and the trucks were shipped by the factory at Springfield direct to buyers in other states on direction of such branches, for the reason that the effect of the inclusion of such sales is to tax property and business of the appellant outside the state of Ohio, and,

therefore, is invalid under the due process clause of the 14th Amendment to the Constitution of the United States;

"(3) In including in business done in Ohio sales of motor trucks produced in appellant's Springfield factories where the orders or contracts were solicited and accepted by branches of the appellant outside Ohio and trucks were shipped by the factory at Springfield direct to buyers in other states on direction of such branches, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the commerce clause of the Constitution of the United States;" (42 N. E. (2d) 55).

The Court below again states the contentions of Appellant that the assessments in question would result "in laying an unconstitutional burden on interstate commerce and in taxing property and business of the appellant outside of Ohio in violation of the due process clause of the United States Constitution" (42 N. E. (2d) 58). In its opinion the Court rejected those contentions.

Appellant fully presented the Federal questions raised in this appeal. Both the Board of Tax Appeals and the Supreme Court of Ohio definitely noticed the Federal questions and decided them, and further reference to the manner in which such questions were raised is unnecessary.

Whitfield v. *State of Ohio*, 297 U. S. 431.

Cases Believed to Sustain Jurisdiction

Cases believed to sustain jurisdiction

Appellant believes that the following cases sustain the jurisdiction of this Court:

International Harvester Company, et al. v. *Department of Treasury, et al.*, 322 U. S. 340.

Cudahy Packing Co. v. *Hinkle*, 278 U. S. 460.

Looney v. *Crane & Co.*, 245 U. S. 178.
Air-Way Electric Corporation v. *Day*, 266 U. S. 71.
Hans Rees' Sons, Inc. v. *North Carolina*, 283 U. S. 123.
Fisher's Blend Station v. *Tax Comm.*, 297 U. S. 650.
J. D. Adams Mfg. Co. v. *Storen*, 304 U. S. 307.
Connecticut General Life Insurance Co. v. *Johnson*, 303 U. S. 77.

Dated, February 19th, 1946.

Respectfully submitted,

EDWARD R. LEWIS,
JOSEPH J. DANIELS,
O. H. MOSIER,
Counsel for Appellant.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OHIO

INTERNATIONAL HARVESTER Co., Appellant,

v.

EVATT, Tax Commr., Appellee

(No. 30316, Decided November 21, 1945)

For the privileges set forth in Section 5495, General Code the state charges a fee against all corporations doing business in Ohio on the value or proportionate value of the issued and outstanding shares of stock of each such corporation. (Section 5499, General Code.) The amount of this fee is based on the proportion of its property held or used in Ohio and of business done in Ohio by a corporation (domestic or foreign) during the preceding year. This fee is computed under Section 5498, General Code, by first determining the value of the issued and outstanding shares of stock of the corporation. Thereafter a base is determined by dividing the value of the issued and outstanding shares into two equal parts. One part is then multiplied by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wherever situated. The other part is multiplied by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year, wherever transacted. The Tax Commissioner then certifies to the Auditor of State the base determined by him through adding the two figures thus obtained. The auditor makes a charge of one-tenth of one per cent upon the base so certified and in turn certifies the amount of the fee to the Treasurer of State. The Treasurer then mails to the corporation a statement showing the value or the proportionate value of the shares of stock upon which such

fee is charged and the amount of the fee. (Section 5499, General Code.)

The operation of a factory in Ohio constitutes business done in Ohio regardless of where the products of such factory are sold. (Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, approved and followed.)

In computing the numerator of the business-done fraction under Section 5498, General Code, the Tax Commissioner may not be required to deduct therefrom (a) the value of goods sold during the preceding year in interstate commerce or (b) raw materials shipped from outside the state, whether partially fabricated or not, and used in the manufacturing process during the preceding year. (Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, approved and followed.)

The volume of sales during the previous year may be used as indicative of the volume of manufacture carried on in an Ohio factory and as a proper element of comparison with the volume of total business done by a corporation in and out of the state. (Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, approved and followed.)

Where a foreign corporation maintains selling branches and warehouses in this state and all sales proceeds both of cash and notes are received by the selling branches and any notes received as part payment are held at the selling branches and interest and principal collected there, the amount of business done in Ohio by such foreign corporation may be measured by the sales made by such selling branches regardless of where products so sold were manufactured or shipped from.

Where a corporation files its annual report with the Department of Taxation and fails to make a claim that it should be required to pay only five-sixths of its annual franchise tax fee by reason of its changing its accounting period from a calendar year to a fiscal year ending October 31, and where upon review under Section 5500, General Code, of the correctness of the determination of the value of its stock, or the proportion of such value as made by the Tax Commissioner, the corporation fails to call to the attention of the Tax Commissioner its claim that by reason of the change of its accounting year from a calendar year

to a fiscal year it should not be charged more than five-sixths of the annual fee, such claim, if any, for reduction is thereby waived. The only authority of the Auditor of State is to charge for collection from a corporation doing business in Ohio one-tenth of one per cent upon the value certified by the Tax Commissioner and there is no authority in the Tax Commissioner to compute the business-done portion of the base otherwise than upon the value of the business done by the corporation in this state during the preceding year.

Appeal from the Board of Tax Appeals

This is an appeal from decision of the Board of Tax Appeals, under Section 5611-2, General Code. The hearing before the board was upon stipulated facts and evidence.

During the years 1934 to 1939, both inclusive, appellant was a corporation organized under the laws of New Jersey. Its general business and accounting office was located in the city of Chicago, Illinois. Its business consisted of the manufacture of agricultural implements, tractors, motor trucks, binder twine and similar commodities and parts thereof and the sale of such products so manufactured. During the above period appellant owned and operated two factories in Springfield, Ohio, as well as factories in several other states. Throughout the years 1934 and 1935 all products of the appellant's Springfield factories were sold f.o.b. Springfield by the appellant to its subsidiaries, International Harvester Company of America, a Wisconsin corporation, International Harvester Export Company and International Harvester Company of Canada, Limited. During that period all United States sales of appellant's products were made by its subsidiary, International Harvester Company of America. During the years 1936 to 1939, inclusive, appellant marketed its products in this country through dealers located in about 37 states who were independent operators. Appellant's Ohio branches during this period were located at Columbus, Cincinnati, Toledo and Cleveland. Retail stores and motor truck substations were located in fourteen other Ohio cities.

In its Ohio franchise tax returns for the years 1935 to 1940, inclusive, appellant listed the value of the business

done by it in this state during the years preceding the date of the commencement of its several current annual accounting periods at certain figures. Upon the audit of such returns the Tax Commissioner determined an increased value of the business done in Ohio for each of the several years in question. The difference between appellant's returns and the Tax Commissioner's determinations arose from a disagreement between the appellant and Tax Commissioner as to the meaning of the expression "the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period" as used in Section 5498, General Code. The figures listed by the appellant in its 1935 and 1936 returns included sales of products of appellant's Springfield factories made by the Ohio branches and retail stores of International Harvester Company of America, a subsidiary corporation. In its returns for 1937 to 1940, inclusive, appellant's figures included parts sales made at the Springfield factories plus sales of Ohio made products made by its Ohio branches and retail stores operated directly by appellant, commencing in 1936.

The Tax Commissioner used the value of all sales of the preceding year, wherever the products were delivered, as indicative of the value of the business done during the preceding year at the factories, plus the sales by branches, of goods manufactured outside Ohio but sold to Ohio customers.

The pertinent part of Rule No. 275 of the Tax Commissioner, which the Board of Tax Appeals held to be applicable in the present computation, provides as follows:

"In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

In its decision the Board of Tax Appeals stated:

"From a full consideration of the evidence and the stipulations, the board finds that in each of the years 1936 to 1939, inclusive, 62% of the sales of goods manufactured in Ohio and sold to customers in states other than Ohio was

sold from warehouses outside the state and, therefore, should be excluded from the numerator of the business fraction in determining the base for the purpose of computing the franchise fee for the years 1937 to 1940, inclusive, and in this respect the action of the Tax Commissioner is modified."

It is contended by appellant that the Board of Tax Appeals erred:

(1) In sustaining the Tax Commissioner in including in the basis of his assessments sales of motor trucks in the years in question where the orders or contracts were solicited and accepted by appellant's branches outside the state of Ohio, and where the trucks were shipped from appellant's Springfield factories on the direction of such branches direct to buyers in other states;

(2) In including in business done in Ohio sales of motor trucks produced at appellant's Springfield factories where the orders or contracts were solicited and accepted by branches of the appellant outside the state of Ohio and the trucks were shipped by the factory at Springfield direct to buyers in other states on direction of such branches, for the reason that the effect of the inclusion of such sales is to tax property and business of the appellant outside the state of Ohio, and, therefore, is invalid under the due process clause of the 14th Amendment to the Constitution of the United States;

(3) In including in business done in Ohio sales of motor trucks produced in appellant's Springfield factories where the orders of contracts were solicited and accepted by branches of the appellant outside Ohio and trucks were shipped by the factory at Springfield direct to buyers in other states on direction of such branches, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the commerce clause of the Constitution of the United States;

(4) In sustaining the tax assessed for ten months' fiscal period ending October 31, 1936, namely, for the period from

January 1 to October 31, 1936, on a full year's basis, whereas such period was only a ten months' period and the tax should have been reduced to five-sixths of the annual tax;

(5) In its decision by making no deduction for the amount of goods sold by branches of the company in Ohio when the goods were shipped direct from factories or transfer houses of the company outside Ohio to buyers in Ohio, while at the same time it included in Ohio business the amount of sales of trucks sold on orders or contracts solicited and accepted by branches of the company outside Ohio when the goods were shipped from the factory at Springfield direct to buyers in other states;

(6) By including in the business done in Ohio, in the basis of its additional franchise tax assessments for the years 1935 and 1936, based on business done and property held, respectively, in the calendar years 1934 and 1935, sales of motor trucks manufactured at appellant's Springfield factories and sold to appellant's subsidiary when the orders for shipment of such goods were sent by branches of appellant's subsidiary outside the state of Ohio to appellant's Springfield factories and when the articles were shipped by the Springfield factories to other branches of appellant's subsidiary outside Ohio or to dealers or consumers residing in states outside Ohio.

O. H. Mosier, of Columbus, and Edward R. Lewis, of Chicago, Ill., for appellant.

Hugh S. Jenkins, attorney general, and Aubrey A. Wendt, of Columbus, for appellee.

TURNER, *J.*:

For the privileges set forth in Section 5495, General Code, the state charges a fee against all corporations doing business in Ohio on the value or proportionate value of the issued and outstanding shares of stock of each such corporation. (Section 5499, General Code.) The amount of this fee or tax is based on the proportion of the corporation's property held or used in Ohio and of business done in Ohio by such corporation (domestic or foreign) during the preceding year. This fee is computed under Section 5498, Gen-

eral Code, by first determining the value of the issued and outstanding shares of stock of the corporation. Thereafter a base is determined by dividing the value of the issued and outstanding shares into two equal parts. One part is then multiplied by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated. The other part is multiplied by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during such year, wherever transacted. The Tax Commissioner then certifies to the Auditor of State the base determined by him through adding the two figures thus obtained. The auditor makes a charge of one-tenth of one per cent upon the base so certified and in turn certifies the amount of the fee to the Treasurer of State. The treasurer then mails to the corporation a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged and the amount of the fee. (Section 5499, General Code.)

This case involves only the method used by the Tax Commissioner to the extent approved by the Board of Tax Appeals for ascertaining the numerator of the business-done part of the formula.

As stated by appellant, a foreign corporation doing business in Ohio, "there is no disagreement between the parties on this appeal as to the total net worth of International Harvester Company to which the Ohio allocation ratio is applied for each year, the amount of appellant's property in Ohio and its total property, and its total business for each of the years involved."

As stated by the Board of Tax Appeals in its journal entry, "consequently, the only matter in dispute is the numerator of the business fraction, which represents the value of the business done by appellant in this state during each of the years involved."

The Tax Commissioner treated the manufacturing done at appellant's factories in Ohio as business done in Ohio. As

indicative of the value of such business done, the Tax Commissioner used the sales value of all appellant's Ohio manufactured products sold in the previous year whether to intrastate or interstate commerce.

As the Board of Tax Appeals reduced the Tax Commissioner's use of appellant's Ohio factories' production by 62 per cent on account of manufactured products shipped from appellant's Ohio factories in each preceding year to warehouses in other states, appellant's complaint is now reduced to the use of 38 per cent of the sales value of the preceding year of products manufactured in Springfield and shipped by the Springfield works during a preceding year direct to buyers in other states, as indicative of the value of business done at appellant's Ohio factories.

It is our opinion that the method followed by the Tax Commissioner and approved by the Board of Tax Appeals, in ascertaining the amount of business done in Ohio, which is all that is in question in the instant case, follows the procedure approved by the Supreme Court of the United States in the case of American Mfg. Co. v. City of St. Louis, 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522, as stated by Mr. Justice Pitney at page 460 of the case:

"The question is whether an ordinance of the city of St. Louis, levying against manufacturers, especially as against plaintiff in error, a West Virginia corporation, a tax imposed as a condition of the grant of a license to carry on a manufacturing business in that city, but the amount of which is ascertained by and proportioned to the amount of sales of the manufactured goods, whether sold within or without the state, and whether in domestic or interstate commerce, is void as amounting to a regulation of commerce among the states and thus intrenching upon the power of the national Congress under Art. 1, § 8, of the Constitution, or as amounting to a taking of plaintiff's property without due process of law, in contravention of the 14th Amendment."

In commenting on the American Mfg. Co. case, Mr. Justice Roberts said at page 312 in the case of J. D. Adams Mfg. Co. v. Storem, 304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct., 913, 117 A. L. R., 429: "The tax on the privilege for the ensuing

year was measured by a percentage of the past year's sales." This is the method followed in the instant case. See, also, Aponaug Mfg. Co. v. Stone, 314 U. S. 577, 86 L. D., 467, 62 S. Ct. 131, affirming the case which arose below in Aponaug Mfg. Co. v. State Tax Commission, 190 Miss., 805, 1 So. (2d) 763; and C. H. Musselman Co. v. Alderson, Tax Commr., 315 U. S. 779, 86 L. Ed. 1187, 62 S. Ct., 580, both decided on authority of American Mfg. Co. v. City of St. Louis, supra.

In coming to its decision in the instant case the Board of Tax Appeals followed the holding of this court in the case of Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, 24 O. O. 405, 45 N. E. (2d), 118, in which we held:

"1. The franchise tax levied pursuant to Sections 5498 and 5499, General Code, on a foreign corporation is for the privilege of doing business in this state or owning a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state. (Section 5495, General Code.)

"2. 'Doing business' in this state is only a part of the privilege taxed under Section 5495, General Code. The tax also covers the privilege of owning a part or all of the foreign corporation's capital or property in this state as well as the privilege of holding a certificate of compliance with the laws of this state.

"3. The Ohio Franchise Tax (Section 5495 et seq., General Code) is not a tax upon commerce, state or interstate. It is not a tax upon income, receipts or sales.

"4. The manufacturing operations within this state by a foreign corporation constitute business done by such corporation in this state within the meaning of Section 5498, General Code.

"5. Tax Commissioner's Rule No. 275 is not unreasonable or unlawful in its application in the instant case. Such rule is favorable to the taxpayer by eliminating from the base upon which the franchise tax is computed goods manufactured in Ohio and sold from warehouses outside of this

state. Such rule eliminates the possibility of double taxation on account of 'business done' by the corporation in the state where sales of Ohio-manufactured goods are made from warehouses in such other state.

"6. In computing the numerator of the 'business done' fraction under Section 5498, General Code, the Tax Commissioner may not be required to deduct therefrom (a) goods sold in interstate commerce, (b) raw materials shipped from outside the state, whether partially fabricated or not, (c) the cost of selling goods manufactured in Ohio but sold outside of Ohio, or (d) administrative expense attributable to sales made outside of Ohio of goods manufactured in Ohio.

"7. A franchise tax computed according to the amount of sales of goods manufactured in Ohio, irrespective of whether such goods are sold within or without the state, in intrastate or interstate commerce, where the payment of the tax is not made a condition of the selling of the goods in interstate or other commerce, but only of continuing in the manufacture of goods within the state, violates neither the commerce clause, Section 8, Article I of the Constitution of the United States, nor the 14th Amendment thereto. (American Mfg. Co. v. City of St. Louis, 250 U. S., 459, followed.)

"8. While a state may not use its taxing power to regulate or burden interstate commerce, on the other hand it is settled by the decisions of the Supreme Court of the United States that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. (Hump Hairpin Mfg. Co. v. Emerson, Secy. of State, 258 U. S., 290, followed.)

"9. A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing local business, if apportioned to the business done or property owned within the state, is not invalid under the commerce clause of the federal Constitution merely because a part of the property

or capital included in computing the tax is used by the corporation in interstate commerce, or because a part of the manufactured product is thereafter sold and shipped in interstate commerce. (International Shoe Co. v. Shartel, Atty. Genl., 279 U. S., 429, and Hope Natural Gas Co. v. Hall, Tax Commr., 274 U. S., 284, followed.)

"10. The validity of an excise tax upon a foreign corporation depends upon its operating incidence. The application of Section 5498, General Code, and Tax Commissioner's Rule No. 275 in computing appellant's franchise tax for the year 1939 produced no unlawful result under the evidence in this case."

Appellant in brief and argument attempts to treat the Ohio franchise tax as a sales tax, an income tax or a gross receipts tax, which it is not.

It is the contention of appellant that no portion of the value of the products manufactured in Ohio which were sold in interstate commerce may be considered as a measure of the business done in Ohio. In other words, if all the products of a manufacturing plant in Ohio were sold in interstate commerce in the preceding year it would then follow that the corporation had done no business in Ohio in such factory.

In substance appellant contends that because some of the raw materials used by appellant in its Ohio manufacturing processes during a preceding year came into the state in interstate commerce and some of the finished products of the factories left the state in interstate commerce during a preceding year, the use of the sales value of the finished products of Ohio manufacture as an indication of the value of the business done in Ohio for the preceding year results in laying an unconstitutional burden on interstate commerce and in taxing property and business of the appellant outside Ohio in violation of the due process clause of the United States Constitution.

In support of its contentions appellant cites cases decided by the Supreme Court of the United States involving taxes on income and on gross receipts. As these cases have been commented on in the case of Aluminum Co. of America v.

Evatt, Tax Commr., supra, we shall not again review those cases here.

As to the case of International Harvester Co. v. Department of Treasury, 322 U. S. 340, 88 L. Ed., 1313, 64 S. Ct., 1019, cited by appellant, it is only necessary to quote the opening sentence of Mr. Justice Douglas' opinion to wit, "This case raises questions concerning the constitutionality of the Indiana Gross Income Tax Act of 1933 * * * as construed and applied to certain business transactions of appellant companies." We find nothing in that case which would tend to indicate the invalidity of our statutory method of computation of the proportionate value of the issued and outstanding shares of a corporation doing business in Ohio.

This court is committed to the proposition that the operation of a factory in Ohio constitutes business done in Ohio regardless of where the products of such factory are sold.

We are also committed to the proposition that the volume of sales might be used as indicative of the volume of the manufacturing carried on in such factories and as a proper element of comparison with the volume, similarly computed, of total business done by the corporation in and out of the state.

The present method of determining part of the base upon which to compute the fee, known as the franchise tax, by measuring the volume of business done in Ohio by the value of the sales of the Ohio manufactured products and comparing such result with the total amount of business wherever done computed by the same method, has been in use in Ohio for many years.

On April 15, 1915, the writer, as Attorney General, issued opinion No. 246 (Vol. 1, Opinions of Attorney General (1915), 460 to the Tax Commission of Ohio in the course of which it was said (page 462):

"I am of the opinion that the operation of factories in Ohio by a foreign corporation constitutes 'doing business' in Ohio regardless of where the products of such factory are sold * * * (Citing cases).

"I am of the opinion that under the provisions of Section 5502, General Code, it is the duty of the commission to select some factor or criterion which will represent the volume

of the business done in Ohio as compared with the volume of the business of the company as a whole; and that the business being manufacturing, and all manufacturing being for the purpose of sale, the sales of the products of the factories may be used as such a measure of the volume of the manufacturing business. When so used the sales do not represent commerce at all, but manufacture, and may just as appropriately be used for this purpose as any other criterion, such as the total value of the manufactured articles."

The present formula was spelled out by the General Assembly in 113 Ohio Laws, 637, passed April 6, 1929. Minor amendments were made in 114 Ohio Laws, 762, and 115 Ohio Laws, 589, which latter law became effective July 18, 1933, and is still in force as Section 5498, General Code.

Section 5495 of the General Code of Ohio defines the purpose for which the franchise tax is levied on both domestic and foreign corporations. As to foreign corporations it is provided therein: "* * * and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable."

Section 5499, General Code, charges a fee of one-tenth of one per cent of the value or the proportionate value of the shares of stock upon which such fee is charged.

Section 5498, General Code, provides the means for determining the value of the outstanding shares of stock of a corporation (domestic or foreign) and prescribes the formula for determining the base upon which the fee provided for in Section 5499 of the General Code shall be computed, to wit: "* * * The commission shall then determine as follows the base upon which the fee provided for in Section 5499 of the General Code shall be computed. Divide into two equal parts the value as above determined of the issued

and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will. (It is agreed that the computation of the foregoing fraction is correct. The dispute is as to the computation under the second part which follows); take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denomniator is the total value of its business during said year wherever transacted."

Section 5497, General Code, requires every corporation doing business in Ohio to submit to the Department of Taxation certain information including:

"7. The amount of its capital, surplus, whether earned or unearned, undivided profits and reserves, as shown by the books of the corporation. A complete schedule shall be filed with the report showing the object and amount of each such reserve; also there shall be filed with said report a schedule of the annual rates of depreciation and depletion;

"8. The location and value of the property owned or used by the corporation as shown on its books, both within and without the state, given separately; and the total amount of business done and the amount of business done within the state by said corporation during its preceding annual accounting period, given separately. Business done within this state by domestic corporations shall include all business except extra-state business."

Section 5500, General Code, provides for a review of the correctness of the determination of the value of the stock, or the proportion of such value, as made by the Tax Commissioner under the provisions of the act which we have been discussing. In reading these sections of the statute the following provision of Section 1464, General Code, should be kept in mind:

"Whenever in any law of this state, in effect at, or after the time the Tax Commission of Ohio and the offices of commissioners or members of said commission shall, by the provisions of this act, be abolished, the term 'Tax Commission of Ohio,' 'commission,' 'commissioner,' or 'member,' meaning the Tax Commission of Ohio or the offices of the commissioners or members of said commission, which by this act shall have been abolished, is used, such term shall be construed as referring to the Department of Taxation, the Tax Commissioner, the Board of Tax Appeals, or the members of said Board of Tax Appeals, as the provisions of this act may require."

Appellant also complains of the failure of the Board of Tax Appeals to make a deduction for the amount of goods sold in a preceding year by branches of the company in Ohio when the goods were shipped direct from factories or transfer houses of the company outside Ohio to buyers in Ohio.

We are unable to find any evidence in the record of the amount of any such shipments. The record does contain the following stipulation:

"6. On the sale of goods by a branch, the branch either delivered the article from its own stock in its warehouse at the branch house, or directed that the goods be shipped by the factory direct either to the dealer, or, in a very small percentage of cases, to the user."

The record also contains the following stipulation:

"All sales proceeds, both of cash and of notes, are received by the selling branches and any notes received as part payment are held at the selling branches and interest and principal collected there."

The stipulation of facts discloses, for the several years, the amount of sales by Ohio branches to Ohio buyers, of goods manufactured outside Ohio. In its journal entry the board said: "All orders had to be approved by the respective branches, which collected the purchase price of such sales and deposited the money in local banks, which was

withdrawable only by the general office in Chicago. Appellant's branches would send shipping orders to the factories to ship goods to the branches for storage in warehouses at the branches until they could sell them, or to ship goods direct to the dealers, and in a few instances, direct to the users." Assuming that such distinction in computing the amount of business done in a preceding year is material and assuming further that the record discloses that "in a few instances" shipments from outside the state were shipped direct to users in Ohio on orders from branches in Ohio, we adopt the following reasoning of the board and hold that the decision of the Board of Tax Appeals was not unreasonable or unlawful in respect thereof, to wit:

"All of the goods which were manufactured out of the state and sold to Ohio customers were shipped on orders received from appellant's branches which it maintained in Ohio, and the board finds that the activities of such branches in this state and their authority in connection therewith constitute doing business within the state regardless of whether such goods were shipped to warehouses of the appellant within the state or directly to customers in Ohio on orders from the branches. In the case of International Harvester Co. of America v. Kentucky, 234 U. S., 579, 58 L. Ed., 1479, the company claimed that so far as the company's activities in Kentucky were concerned, it was engaged solely in interstate commerce and was, therefore not subject to the jurisdiction of the state. The court held, however, that the continuous solicitation of orders through local agents of the company of goods manufactured outside the state and delivered into the state, the agents having authority to receive money and notes for the purchase price of such goods, constituted doing business in Kentucky. See, also, on this point, International Harvester Co. v. Department of Treasury, 322 U. S., 340, 88 L. Ed., 1313."

Under the Tax Commissioner's Rule No. 275, the Board of Tax Appeals eliminated from consideration 62 per cent of the volume of goods manufactured at appellant's Ohio factories, on the ground that such proportion of appellant's Ohio manufactured products were shipped to warehouses *outside* Ohio. For the governmental protection to appel-

lant's 100 per cent manufacturing operations in Ohio the Department of Taxation has based its computation of the business fraction upon 38 per cent of the business done in Ohio at appellant's factories. By the use of Rule 275, the Board of Tax Appeals made a substantial reduction in the fee to be paid by appellant.

A subsidiary question is set out in appellant's brief. This question was brought about by appellant changing its accounting period from the calendar year to the fiscal year, which appellant claims resulted in assessing a full year's tax for a ten months' period. During the hearing before the board no complaint was made on that score so far as the record discloses. The only mention of such matter in the record is to be found in explanatory notes to appellant's exhibits, to the effect that the company had changed its accounting year to a fiscal year ending October 31. In its application for rehearing by the Board of Tax Appeals appellant states that no consideration was given to the point made in appellant's brief in respect to the fiscal period ended October 31, 1936. An examination of appellant's annual report for 1936 (a part of the period here) filed with the Tax Commission by appellant gives the date of beginning of the current annual accounting period as January 1, 1936. The 1937 report gives the date of the beginning as November 1, 1936 but there is no claim in either report that the company is not liable for the fee for a full year. The record does not disclose that such matter was brought to the attention of the Tax Commissioner upon review under Section 5500, General Code. Therefore such claim, of any, is waived. There is no provision in the statutes for remitting any portion of the fee. The only authority of the Auditor of State is to charge for collection from a corporation doing business in Ohio one-tenth of one per cent on the value certified by the Tax Commissioner (Section 5499, General Code), and there is no authority in the Tax Commissioner to compute the business-done portion of the base otherwise than upon the value of the business done by the corporation during the preceding year. (Section 5498, General Code.)

The form of reports for 1936 does contain the statement: "A corporation which filed its statement for admis-

sion to do business with the Secretary of State of Ohio on or after January 1, 1936, will not be required to file an annual report until 1937." Similarly the 1937 form makes the first filing date after admission as 1938. We hold that the decision of the Board of Tax Appeals is not unreasonable or unlawful in this respect.

As pointed out above, the instant case does not involve a tax on sales or income but is solely a fee charged upon the value or proportionate value of the shares of stock of a corporation for the privilege of doing business in Ohio and of owning a part or all of its capital in this state or for a holding of the certificate of compliance of this state authorizing it to do business in this state and is computed in part on business done in a year preceding the year for which the fee is assessed. In the Aluminum Co. of America case, *supra,* which we approve and follow here, and in the instant case, we relied upon and now rely upon, ***inter alia,*** American Mfg. Co. v. City of St. Louis, 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522; Hump Hairpin Mfg. Co. v. Emerson, Secy. of State, 258 U. S. 290, 66 L. Ed. 622, 42 S. Ct. 305; International Shoe Co. v. Shartel, Atty. Genl., 279 U. S. 429, 73 L. Ed. 781, 49 S. Ct. 380; and Hope Natural Gas Co. v. Hall, Tax Commr., 274 U. S. 284, 71 L. Ed. 1049, 47 S. Ct. 639.

The record in this case discloses no instance of double taxation.

Upon hearing and consideration of the record and evidence in this case we are of the opinion that the decision of the Board of Tax Appeals appealed from is reasonable and lawful and, therefore, that decision should be and hereby is affirmed.

Decision affirmed.

Weygandt, C. J., Zimmerman, Matthias and Hart, JJ., concur.

Bell, J., concurs in paragraphs two, three, four, five and six of the syllabus and in the judgment.

Williams, J., not participating.